

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

To be argued by:

GEORGE SHEINBERG, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-1247

UNITED STATES OF AMERICA

Appellee

Docket No. 77-1247

-against-

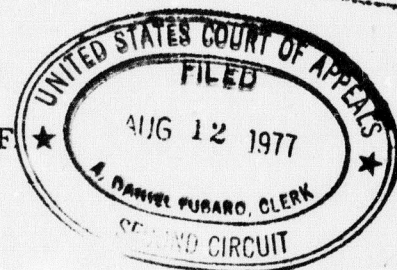
CARLOS RIVERA and LUIS ACEVEDO,

Appellant.

B
P/S

On Appeal from the United States District Court
For the Eastern District of New York

APPELLANT CARLOS RIVERA'S BRIEF



GEORGE SHEINBERG

ATTORNEY AT LAW
66 COURT STREET
BROOKLYN, N. Y. 11201

ULSTER 2-8282

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GEORGE SHEINBERG
Attorney for Appellant
66 Court Street
Brooklyn, New York 11201
ULster 2-8282

INDEX

	<u>Page</u>
Table of Cases	A
Preliminary Statement	1
Summary of Proof	2
POINT I The Government Did Not Prove Defendant's Guilt Beyond a Reasonable Doubt	5
CONCLUSION The Judgment of Conviction Of The Appellant Carlos Rivera Should be Reversed	13

TABLE OF CASES

		Page
U.S v Taylor,	464 F2d 240	6
U.S.v. DeGares	518 F2d 1156	6
U.S.v. Jones	308 F2d 26	7
U.S. v, Hernandez	290 F2d 86	7
U.S. v. Gargulo	310 F2d 249	9
U.S. v. Johnson	513 F2d 99	9 & 13
U.S. v. Peoni	100 F2d 401	9
Nye & Nisser v. U.S.	336 US 613	9
U.S. v. Dickerson	508 F2d 1216	10
U.S. v. Cirillo	499 F2d 872	12
U.S. v. Cinchette	315 F2d 584	12
U.S. v. Steinberg	525 F2d 1126	12
U.S. v Falcone	109 F2d 579	13

STATEMENT

This is an appeal by the defendant, CARLOS RIVERA, from a judgment of conviction of the crimes of possession with intent to distribute and the sale of certain quantities of controlled substances, and conspiracy to distribute a quantity of controlled substances, all of said controlled substances being heroin hydrochloride. It is alleged that on November 15, 1976, within the Eastern District of New York, the appellant, together with one LUIS ACEVEDO possessed with intent to distribute and sold a certain quantity of heroin hydrochloride, a controlled substance and further, that beginning on November 4, 1976 and lasting until November 15, 1976, within the Eastern District of New York, the appellant CARLOS RIVERA together with one LUIS ACEVEDO with others known and unknown to the Grand Jury did conspire, agree and confederate to distribute a quantity of heroin hydrochloride, a controlled substance.

On March 31, 1977, after a trial with a jury before the Hon. JACK WEINSTEIN, U.S.D.J. at the United States District Court for the Eastern District of New York, the appellant was found guilty and thereafter on May 13, 1977 was sentenced to a term of imprisonment for five years on each count of the indictment. Each term of imprisonment to run concurrent with

the other and the appellant CARLOS RIVERA was further sentenced to a special parole term of five years.

SUMMARY OF PROOF

The government presented two witnesses in their direct case, to wit: DWEIGHT RABB, a Special Agent of the Department of Justice, Drug Enforcement Administration and one FRED MOORE, a Special Agent of the Justice Department, Drug Enforcement Administration.

Special Agent RABB testified that on September 23rd he met with LUIS ACEVEDO, the co-defendant in the trial at 624 Oceanview Avenue, in Brooklyn, New York, and at that time made a purchase of heroin from Mr. ACEVEDO. At the time of said purchase, the defendant and appellant CARLOS RIVERA was neither present nor mentioned by any of the participants. Thereafter, after various negotiations subsequent to September 23, 1976, Special Agent RABB arranged for another purchase of narcotics on November 15, 1976. Throughout the entire negotiations of September 23rd and leading up until the actual purchase of narcotics on November 15, 1976, did MR. CARLOS RIVERA'S name enter the picture nor did Special Agent RABB nor anyone else connected with the government in the purchase of said narcotics, know of, hereof or see, CARLOS RIVERA.

On November 15, 1976, Special Agent RABB together with other agents of his group, prepared to make a purchase of narcotics in the area of the co-defendant LUIS ACEVEDO'S home, located at 610 Oceanview Avenue, Brooklyn, New York. At approximately 1:30 of that day, Special Agent RABB dispatched one MIKE SOTO to meet with LUIS ACEVEDO and make arrangements for the transfer of the narcotics. Special Agent RABB was in his automobile, Mr. SOTO spoke to Mr. ACEVEDO and thereafter Mr. ACEVEDO, Mr. SOTO and another individual, who was later identified as CARLOS RIVERA started to walk towards Special Agent RABB'S automobile.

This, for the first time is the entrance of Mr. CARLOS RIVERA into the proceeding before the Court. At no time prior to this date of November 15, 1976 did Special Agent RABB or any other members connected with the Justice Department, Drug Enforcement Administration, know of, here of or see CARLOS RIVERA with respect to this or any other proceeding.

The testimony of Special Agent RABB continued, that when all three approached his automobile, Mr. CARLOS RIVERA was walking towards the car, was wearing a pea^h coat and had his hand in his coat.

It is further alleged that Mr. ACEVEDO transferred to Special Agent RABB containing three ounces of heroin, and during this entire proceeding, CARLOS RIVERA stood there watching the transaction and said absolutely nothing. It was further testified by Special Agent RABB that CARLOS RIVERA during this entire proceeding had his hand in his coat. After the transfer of narcotics by ACEVEDO to Special Agent RABB, an alert was sounded by Special Agent RABB and CARLOS RIVERA and LUIS ACEVEDO were arrested.

Special Agent MOORE testified in the same vein as Special Agent RABB as to the narcotics arrest on November 15, 1976.

In the testimony of Agent RABB and Agent MOORE under both direct and cross-examination, at no time did either of the Special Agents state to the Court and jury that CARLOS RIVERA was involved in any prior transactions with the Special Agents who testified or that CARLOS RIVERA was known to the Special Agents who testified with respect to this proceeding. The only testimony adduced at this trial with respect to CARLOS RIVERA'S participation in the sale of narcotics on November 15, 1976 was that CARLOS RIVERA was there, was present, said nothing, did nothing, except keep his hand in his coat,

and watched the entire matter transfer from ACEVEDO to RABB.

The defense then rested.

The Court denied defendant CARLOS RIVERA'S motion for a directed verdict and submitted the entire case to the jury.

The Jury found both defendants guilty on all counts and the defendant CARLOS RIVERA as has been indicated, was sentenced to five years imprisonment concurrently on each count of the indictment and a five year special parole term.

POINT I

THE GOVERNMENT DID NOT PROVE
DEFENDANT'S GUILT BEYOND A
REASONABLE DOUBT

CARLOS RIVERA was charged and convicted of three counts under the indictment herein. Count three charged possession with intent to distribute various amounts of heroin; Count two charged distribution; Count one charged participation in illegal conspiracy to distribute a quantity of narcotics, to wit: heroin. The government failed to prove the defendant's guilt beyond a reasonable doubt with respect to all three counts. Furthermore the evidence was insufficient to warrant the submission to the Jury of the facts before it. The test to

determine whether to grant a motion for a directed verdict is whether a reasonable mind might fairly conclude guilt beyond a reasonable doubt. U.S. v. Taylor, 464 F.2d 240,243 (Second Circuit, 1972); U.S. v. DeGarees, 518 F.2d 1156.

Clearly from the evidence adduced at the trial, there was no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt. Mr. RIVERA did nothing more than be present at the scene of a crime. Consequently, the judgment of conviction must be reversed.

In referring to the indictment in its reverse order on behalf of the appellant CARLOS RIVERA, counsel wishes to refer to Count three of the indictment. Title 21, U.S.C. Section 841(a)(1).

Count three charged the defendant with possession of heroin hydrochloride with intent to distribute it, a violation of the above section of law. The three elements of the crime as stated by the Court in its charge (R103) are:

- 1) That the defendant did in fact possess heroin;
- 2) That the defendants "knowingly" or "intentionally" possessed the heroin;
- 3) That the defendant, if he possessed the

drug, intended to distribute it.

The three elements were not satisfied with respect to Mr. CARLOS RIVERA, the appellant herein. "Possession" as defined by the Court not only means actual physical possession of the drug, but also encompasses the power to control the disposition of the drug, (i.e. dominant control) as well. Clearly, the testimony did not show that Mr. RIVERA had physical possession or even touched the drugs. Nor did the testimony warrant a conclusion that Mr. RIVERA had constructive possession. As the Court in U.S. v. Jones, 308 F.2d 26,30 (2nd Circ., 1962) quoting U.S. vs. Hernandez, 290 F.2d 86, (2nd Circ., 1961) stated:

"One having a working relationship or a sufficient association with those having physical custody of the drugs so as to enable him to assure their production, without difficulty to a customer as a matter of course, may be held to have constructive possession. But a casual facilitator of a sale, who knows a given principle possesses and trades in narcotics, but who lacks the working relationship with that principal that enables an assurance of delivery, may not be held to have dominion and control over the drugs delivered and cannot be said to have possession over it."

Here, there was little testimony to show that Mr. RIVERA had enough, if any, of a working relationship with

Mr. ACEVEDO to the extent that one would reasonably say that he was in dominion and control. There was no evidence that Mr. RIVERA set the price of the drugs, had a say as to the means of transfer, or was in a position to assure delivery. The only thing that was shown beyond a reasonable doubt was that Mr. RIVERA was in fact present during the transaction on November 15, 1976. Clearly, unless we are to read the phrase "possession" to mean merely presence during a transaction involving a narcotic drug, the conviction below should not be affirmed because no reasonable person can say that Mr. RIVERA had possession unless he engages in speculation wholly unwarranted by the trial record. It follows that elements two and three were not proven beyond a reasonable doubt.

Although, as the Court correctly stated, (R104) that in considering Count three, it was not necessary for the government to show that Mr. ACEVEDO or Mr. RIVERA themselves performed all the acts necessary to establish the crime of possession with intent to distribute because of the aiding and abetting section of the U.S.C. (Title 18, U.S.C. para 2). Even under this section, there was not enough evidence to prove Mr. RIVERA guilty beyond a reasonable doubt. The necessary elements are that the defendant must have knowingly and willfully aided, abetted, counseled, commanded, induced or

procured the commission of the crime or possessing heroin with the specific intent to do something the law forbids.

The records show that Mr. RIVERA did little except stand by with his hand under his coat, while the drug transaction took place. The fact that he was present or knew of the transaction is not sufficient to prove aiding and abetting. Absent evidence of purposeful behavior, mere presence at the scene of a crime even when coupled with knowledge that a crime is being committed is insufficient to prove aiding and abetting. U.S. v. Gargulo, 310 F.2d 249, 253 (2nd Circ., 1962); U.S. v. Johnson, 513 F.2d 819, 823 (2nd Circ., 1975). Additionally, the fact that Mr. ACEVEDO introduced Mr. RIVERA as "my man Carlos" is not sufficient to prove aiding and abetting, (R25). The government indicated that the mere phrase "my man" identified Mr. RIVERA as the source alone certainly does not establish Mr. RIVERA'S guilt. Guilt may not be inferred from mere association with the guilty party. U.S. v. Johnson, *supra* at 824. In Nye and Nissen v. U.S. 336 U.S. 613,619, (1949) the Supreme Court said: quoting Judge LEARNEDHAND in U.S. v. Peoni, 100 F.2d 401,402 (2nd Circ., 1938):

"In order to aid and abet in order to commit a crime, it is necessary that the defendant in some sort associate himself with

the venture, that he participates in it as if it were something he wishes to bring about, that he seek by his action to make it succeed."

See U.S. v. Dickerson, 508 F2d 1216, (1975) U.S. v. Mariana, 539 F2d 915 (1976).

The facts adduced at trial did not show that RIVERA had any stake in the alleged venture. That no drugs were found on him, nor were any weapons found. Nor was there any showing that his fingerprints were found on the bags. The government argued that his participation was to "protect his ware" (R83), By standing by with his hand under his coat and that weight should be given to this. The fact that Mr. RIVERA stood with his hand or hands under his coat was proven beyond a reasonable doubt. However, that he did so to "protect his wares" was not proven. It was more likely that he did so because it was approximately 40 degrees outside. Clearly the government did not overcome its burden of proof.

Count two of the indictment, violation of Title 21, U.S. 841(a)(1) charged the defendant with knowingly and willfully distributing the heroin mentioned in the earlier "possession" count. There are two elements to this crime, (R106).

1) That the defendants or someone with whom they were acting in concert acted knowingly and intentionally;

2) That the defendants or someone with whom they were acting in concert did in fact distribute the heroin.

Clearly, Mr. RIVERA did not distribute the heroin, i.e. hand over or transfer anything. All Mr. RIVERA did was be present during the transaction which took place on November 15, 1976.

Again under the terms of Section 2 of Title 18 of the U.S.C., it is sufficient that rather than distribute the drugs himself, the defendant aided, abetted, counseled, commanded, induced or procured the commission of the crime.

In Title 18, U.S.C. 2, the evidence is insufficient to prove the defendant guilty beyond a reasonable doubt since the testimony only proves that Mr. RIVERA did not participate in the transaction. It does however prove that he was present during the transaction. As stated before merely presence is insufficient to prove guilt of aiding and abetting beyond a reasonable doubt.

Count one charged Mr. ACEVEDO and Mr. RIVERA with participation in an illegal conspiracy to distribute a quantity of heroin commencing at least on November 4, 1976 and lasting until at least November 15, 1976, in violation

of 21 U.S.C. 841(a)(1).

The element of the crime of conspiracy as stated by the Court (R107) are as follows:

- 1) That there be two or more persons involved;
- 2) That they willfully or knowingly conspire or agree;
- 3) That they willfully conspire to commit an act which is unlawful;
- 4) That one of the members of the conspiracy do an act to effect the object of the conspiracy.

There was absolutely no testimony offered to sustain a basis for a conspiracy count. Firstly there was no evidence that Mr. ACEVEDO nor Mr. RIVERA agreed or conspired to commit an unlawful act. There must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it or make it succeed. U.S. v. Cirillo, 499 F2d 872,883 (2nd Circ., 1974).

Secondly, the defendant must make an "affirmative attempt" to further the purpose of the conspiracy. U.S. v. Cinchetti, 315 F2d, 584,588. U.S. v. Steinberg, 525 F2d 1126, (1975).

Mr. RIVERA did nothing more than stand and watch. This hardly constitutes an "affirmative attempt".

Thirdly, the co-conspirator must "promote the venture himself, . . . have a stake in its outcome". U.S. v. Falcone, 109 F2d 579,581 (2nd Circ., 1940). Also see U.S. v. Johnson, supra.

The facts adduced at trial and in the record did not prove that Mr. RIVERA had any stake in the venture and again the government failed to establish proof beyond a reasonable doubt as to CARLOS RIVERA'S guilt in the alleged conspiracy.

CONCLUSION

THE JUDGMENT OF CONVICTION OF THE APPELLANT
CARLOS RIVERA SHOULD BE REVERSED.

Respectfully submitted,

GEORGE SHEINBERG
Attorney for Appellant
66 Court Street
Brooklyn, New York

RECEIVED
U. S. ATTORNEY

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EAST. DIST. N. Y.

Joseph A. Cheneau